THE PROBLEM OF GOING VALUE. — The normal price of an article produced under competitive conditions gives the producer a fair return (and no more) plus the cost of production. The regulation of rates of public service companies is an attempt to fix by artificial means, in the absence of competition, a price which will limit compensation to a fair return plus the cost of production. If no plant were necessary, the cost of production would be simply the cost of materials and labor. Since, however, there must always be an expensive permanent business equipment, an additional element of production cost is the yearly cost of the use of the present outlay of capital devoted to the public.[1] This present outlay of capital amounts to the original cost of the full business equipment, minus physical depreciation, and plus or minus any increase or decrease in value of the equipment due to a change in the present "cost-value" of that equipment.[2] Rates must be charged, then, which will meet operating expenses and yield a fair return on the present cost-value of property in use, ascertained in the way just mentioned.

Much difference of opinion exists as to whether what is called "going value" should be included in the computation of the present cost-value of the property in use.[3] A recent case in the New York Court of Appeals, in including it, follows the better view. *People* v. *Willcox*, 104 N. E. 911. The confusion, it is submitted, is due to a lack of understanding of what "going value," used in this connection, really amounts to. It clearly cannot include the capacity to continue to make large profits under rates which have not been found to be reasonable. But it is true, in the first place, that there is a great difference between the naked plant of a manufacturing concern, its "bare bones,"[4] and a running business into which life has been infused by means of a system or organization.[5] Such

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[1] The discussion up to this point is condensed from an article on "Fair Value for Rate Purposes," by Robert H. Whitten, in 27 HARV. L. REV. 419.

[2] This seems to be, roughly, a fair statement of the best method of computing the present cost-value of the property devoted to the public. Other methods, of course, are possible. See Mr. Whitten's article, *supra*. This present cost-value must be carefully distinguished from the enhanced value of a concern due to the large profits it may return, which, of course, would be useless for rate purposes. The expression "present cost-value" is used because it is thought to express the conception of the capital charge on which the company is allowed to earn a fair return better than the expression "present value" does. The courts, however, almost uniformly use the term "present value."

[3] Cases holding that it should be included are: Public Service Gas Co. *v.* Board of Commissioners, 84 N. J. L. 463, 87 Atl. 651 (this case and the principal case are now the two leading cases on the subject); Venner Co. *v.* Urbana Waterworks, 174 Fed. 348; Des Moines Water Co. *v.* City of Des Moines, 192 Fed. 193; Pioneer Tel. & Tel. Co. *v.* Westenhaver, 29 Okla. 429, 118 Pac. 354; Application of the Northern Michigan Power Co., Orders and Opinion of Michigan Railroad Com., Vol. II, No. 1, p. 25.

Cases holding that the item should not be allowed are: Cedar Rapids Water Co. *v.* City of Cedar Rapids, 118 Iowa 234, 91 N. W. 1081; Consolidated Gas Co. *v.* City of New York, 157 Fed. 849; Mayhew *v.* Kings County Lighting Co., 2 P. S. C. 1st Dist. (N. Y.) 659 (the principal case before the commission); Municipal League of Phœnix *v.* Pacific Gas & Electric Co. (decision of the Arizona Commission) reported 21 A. Tel. & Tel. Co. leaflets 699 — see particularly pp. 715–717; Fuhrmann *v.* Cataract Power & Conduit Co., 3 P. S. C., 2d Dist. (N. Y.) 656. The New York commissions, however, will be forced to alter their views because of the decision in the principal case.

[4] Quoted from the opinion of Mr. Justice Lurton in Omaha *v.* Omaha Water Co., 218 U. S. 180, 202, 30 Sup. Ct. 615, 620.

[5] See an especially good statement in M. K. & T. Ry. Co. *v.* Love, 177 Fed. 493, 496.

a system costs money. Brain work creates it; and that brain work, and necessary incidental expenses, must be paid for. In the second place, since the organization, when completed, is a recognized permanent instrument of production, the necessary cost of perfecting it is part of the capital expenditure. Proof of this is found in the fact that it does not, like an operating expense, produce an immediate return, but goes into something permanent which without additional outlay brings in its return year after year — the distinguishing characteristic of capital expenditures.

Such going value, then, seems clearly an element of capital charge. But in estimating it a difficulty arises from the fact that the expense of acquiring it includes portions of the salaries of employees, which are charged to operating expenses. How shall the amount of salaries which has gone to acquiring this going value be determined? It is best done by adopting a system which takes into consideration the period of time, during the building up of the system, in which the original capital lay unproductive — a loss which is clearly an element of the cost. The investors who place their money in an enterprise which they know will not give them a fair return until a system is perfected, put into the investment during these first years the amount of money which they would have received as interest or profit on their capital in another business. To that amount, under normal circumstances, the plant's present cost-value is increased, that is, in addition to the physical materials, the plant has cost the use of the capital during the unproductive period.[6] This includes the cost of personal services in constructing the organization, because that amount which has been charged to operating expenses has to that extent cut down the theoretically justifiable profits.

One more matter must be noted as to the estimation of a plant's going value. In all matters of valuation, the figures taken represent the present cost-value, not the actual cost-value. Thus, if poor management made the physical plant cost more than it should, the company can fix its present cost-value only at what it should be, not at what it actually cost the company to acquire it. So it is with going value. Its present cost-value must not be fixed with reference to the actual facts. A hypothetical plant, built simultaneously with the existing one, must be taken as the criterion, and the present cost-value of its operating system, i. e. its going value, found. In the principal case, it would seem that the present cost-value of the going value was computed solely with reference to the existing plant; and in this respect the case seems objectionable.

PRIVILEGE IN PETITIONS FOR PARDON.— Privilege in the law of libel and slander is of two kinds: that which is defeasible by proof of malice, and that in which malice or wrong motive is not considered. To allow

[6] The analogy of interest during the physical construction of the plant is helpful. The sum that the capital would have earned at a fair interest (query, whether this should not be at a fair profit) during the construction period is added to the capital, for the plant has cost the use of the capital during this period. Long Branch Commission *v.* Tintern Manor Water Co., 70 N. J. Eq. 71, 62 Atl. 474; Pioneer Tel. & Tel. Co. *v.* Westenhaver, *supra.*